FILED
SEP 4 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 380

ANDREW KENNY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Regulation Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	8
Appendix A—Opinion and Judgment Below	1a
B—Opinion, *Taylor* v. *U. S.*, 131, C. Cls. 387	3a
C—Statute and Regulation	16a

CITATIONS

CASES:

Stringer v. *U. S.*, 117 C. Cls. 30 ..... 5, 6
Taylor v. *U. S.*, 131 C. Cls. 387 .....3, 4, 6, 7
Wittner v. *U. S.*, 110 C. Cls. 231 ..... 4, 6

STATUTES:

Veterans' Preference Act of 1944, c. 287; 58 Stat. 387, as amended:
Sec. 14 (5 U. S. C., 1952 ed., Sec. 863).....2, 7, 16a

REGULATIONS:

Civil Service Regulation 22.2(c) (1949), 5 CFR 22.2 (c) (1949 ed.) 17a

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on March 6, 1956.

CITATIONS TO OPINION BELOW

The opinion of the Court of Claims, printed in Appendix B hereto, infra, p. 1a, is not yet reported in the Court of Claims reports.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1956, R. 71. Rehearing was denied on June 5, 1956. R. 74. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255 (1).

QUESTION PRESENTED

Whether the discharge of a veterans' preference eligible is invalid because he is removed from active duty status, separated from the payroll and placed on involuntary annual leave during the thirty days' notice period where the statute requires that every preference eligible "shall have at least thirty days advance written notice" of proposed adverse action?

STATUTES INVOLVED

The statutory provisions involved are Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, as amended; 61 Stat. 723; 5 U.S.C., 1952 ed., Sec. 863. They are printed in Appendix C, infra, p. 16a.

REGULATION INVOLVED

The Civil Service Regulation involved, 5 CFR 22.2 (c) 1949 ed., is printed in Appendix C, infra, p. 16a.

STATEMENT

Invoking jurisdiction of the Court under 28 U.S.C., 1952 ed., Sec. 1491, plaintiff filed suit against the United States in the Court of Claims on March 24, 1955, for loss of pay arising from his alleged wrongful dismissal as a civil service employee, plus the difference in salary between Grade P/3 and Grade P-4/GS 11 from September, 1949 to April, 1951 on the grounds

that during that period, he had performed duties of the higher grade while being paid at the rate of the lower. The Government answered and subsequently filed a Motion for Summary Judgment. The plaintiff filed a cross-motion for summary judgment and the Court decided the case on the motions. The facts pertinent to this petition were not in dispute in the Court below and are as follows: Plaintiff was a veterans' preference eligible employed in the Veterans' Administration in Washington, D. C. On May 12, 1953, he was given notice of proposed removal, charging him with insubordination and advising him that if the charges were sustained, the removal would be effective in not less than thirty days. Said notice also stated that plaintiff was being administratively placed on annual leave on May 13, 1953, the day following the notice. Having found that the specifications of the charges had been sustained, the Veterans' Administration accomplished plaintiff's removal on June 12, 1953, with appropriate notification to him. Thereupon, plaintiff appealed to the Civil Service Commission, which affirmed the removal action.

The Court of Claims granted the Government's Motion for Summary Judgment except as to plaintiff's salary during the thirty days' notice period, holding that plaintiff's rights had been plainly violated when the thirty days' notice period had been deducted from his annual leave to which he was entitled upon separation. Accordingly, the Court below, two judges dissenting, granted plaintiff's motion to the extent of awarding him thirty days' salary, on the authority of the Court's decision in *Taylor* v. *United States,* 131 Ct. Cls. 387, decided April 5, 1955,[1] the dis-

[1] For convenience, the opinion of the Court of Claims in the *Taylor* case is printed in Appendix B, infra, p. .

sent being by the same judges and for the same reasons as the dissent in the above cited case. The Court held in the *Taylor* case, supra, that the statutory requirement of "* * * thirty days' advance written notice * * *" (Section 14, Veterans' Preference Act, 58 Stat. 387, 390, as amended, 61 Stat. 723; 5 U.S.C. 863 (1952 ed.)) means "* * * that he shall have 30 days' notice in advance of his discharge, which means in advance of his being separated from the payroll * * *." *Taylor* v. *United States*, 131 Ct. Cls. 387, 391. Having found that the plaintiff therein had been separated from the payroll *eo instante*, the Court ruled invalid the regulation purporting to authorize such action, but, nevertheless, upheld the removal and awarded him only thirty days back pay instead of the back pay to which he would have been entitled had the discharge been declared void.

REASONS FOR GRANTING THE WRIT

1. The Rulings of the Court Below in the Instant Case and in Taylor v. United States, on Which the Opinion is Based, Conflict With the Court's Long Standing Rule That the Procedure Provisions of the Veterans' Preference Act Are Mandatory and Require Strict Compliance

The decisions of the Court of Claims in the instant case and the *Taylor* case, supra, signify a clear-cut departure from the Court's long established ruling that procedure provisions of the Veterans' Preference Act are mandatory and that strict compliance is required if the removal is to be valid and effective. In the case of *Wittner* v. *United States*, 110 Ct. Cls. 231 (1948), the Court below held:

> "We held in the case of *Elchibegoff* v. *United States*, 106 C. Cls. 541, that the procedure provisions of the Act of 1912 in respect to charges

against civil service employees were mandatory. To hold otherwise would be to hold that Congress was merely engaging in mental exercises when it enacted such provisions. They were enacted for the protection of civil service employees against arbitrary action by officials." [p. 233]

* * *

"If the procedure provisions are not mandatory they are largely meaningless. The officials could act as if such provisions were never put into the law. . . ." [p. 234]

* * *

"The language is clear. It does not prevent a discharge, if the procedure is followed, but it does forbid a discharge unless it is followed." [p. 234]

* * *

"It places no undue burden on any official, even though he might prefer to choose his own method. But the procedure has been set out in the law. It is simple, easy to follow, and protects both the veteran and the Government. It should be followed." [p. 236]

In *Stringer* v. *United States,* 117 Ct. Cls. 30 (1950), the preference eligible had been given 29 days advance notice of proposed reduction in grade instead of 30 days. The action was declared invalid by the Court of Claims which said:

"We hold that plaintiff did not receive 'at least thirty days advance written notice' as required by the act. He received notice on August 17, 1944, informing him that 'effective 16 September 1944, the grade and salary of your position will be reduced.' In computing the thirty day period, the day on which the notice was given is regarded as an entirety, or a point of time, and is excluded. * * * Furthermore, thirty *full* days

of notice are required; and the period of notice therefore had to extend to the last minute of the thirtieth day, which was September 16. * * * [p. 48]

* * * Nor can we accept defendant's contentions that plaintiff must show wherein he was harmed by the insufficiency of the notice period and that the doctrine of *de minimis non curat lex* applies here. We cannot construe a statute that plainly says 'at least thirty days' as meaning 'not quite thirty days'. *The requirements of Section 14 are specific and mandatory. Neither this court, nor the Civil Service Commission, nor the Chief of Engineers can disregard them. Strict compliance is required.*" [p. 49] [Emphasis supplied]

In the instant case and the *Taylor* case, the Court reasons that petitioner's right to answer the removal charges was safeguarded and that he was not harmed by deprivation of his pay during the thirty days' notice period. We submit that this is completely unrealistic. Such reasoning totally ignores the fact that petitioner has to pay his living expenses, hire counsel to defend him and to be relieved from the time-consuming task of job hunting during the thirty days' notice period in order to properly prepare his defense. Indeed, it is difficult to understand how the same Court that decided the *Stringer* case and the *Wittner* case could have reached the conclusion in the instant case. In the *Stringer* case, the Court below held the removal null and void because the employee was afforded twenty-nine days' notice instead of thirty. Stringer was deprived of only one day's pay. Petitioner herein was denied pay for thirty days. To conclude that prejudice to Stringer was clearly present because it involved denial of one day of "time to prepare" and

that prejudice to petitioner is absent because only deprivation of his pay for thirty days, his "wherewithal to prepare", was involved, and to refuse relief to petitioner after granting it to Stringer, is to abandon the philosophy of the Court as reflected in the past in setting aside removal actions where they are in any way procedurally defective. It constitutes a reversal of the Court's previous holdings that the principle of *de minimis non curat lex* does not apply to the procedural provisions of Sec. 14 of the Veterans' Preference Act, supra. It substitutes a test of "substantial compliance" for the previous requirement of "strict compliance" and, in practical effect, shifts the burden to the preference eligible to show that he was actually prejudiced or harmed by the Agency's failure to comply with the statutory procedures. Imposing such a burden on the employee is in conflict with the statute and is a serious encroachment on the rights of veterans' preference eligibles. In this case, petitioner, relying on the Court's previous decisions, was misled into believing he had no such burden of proof and the Court, disposing of the case on cross-motions for summary judgment without taking evidence, illogically assumed that he had not been harmed because it was only *money* that he had been denied. This seems especially inappropriate for the Court of Claims.

2. This Case Raises an Important and Novel Question in the Administration of the Veterans' Preference Act That Merits Review by This Court

The matter of employees' rights in removal, reduction or suspension cases under the Veterans' Preference Act is thoroughly confused by the decisions of the Court of Claims in the instant case and in *Taylor*

v. *United States, supra.* Heretofore, strict compliance with the procedure provisions of the statute had been required. Now, it appears that only substantial compliance is necessary and that the preference eligible must show wherein he has been damaged or prejudiced by the Agency's failure to adhere to the statutory procedure. If allowed to stand, these rulings will permit gradual erosion of employees' rights under the Act and inevitably result in serious harm to vast numbers of Federal workers. Since this question is of such vital importance in the administration of the Government Civil Service, it is hoped that the United States will join in this petition in order to obtain from this Court a clear guide to agency personnel action in the future. Therefore, we believe that review by this Court is essential.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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Dated: August 31, 1956

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 120-55

(Decided March 6, 1956)

ANDREW KENNY v. THE UNITED STATES

Mr. Andrew Kenny, pro se.

Mr. Lino A. Graglia, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

WHITAKER, *Judge,* delivered the opinion of the court:

This case is before the court on defendant's and plaintiff's motions for summary judgment.

Plaintiff, a preference eligible, brings suit alleging that he was wrongfully discharged from his position. He was discharged on the ground that he was insubordinate, in that he refused to perform the duties assigned to him. Plaintiff does not deny that he refused to perform the assignments, but says that he should not have been assigned these duties because they were duties to be performed by an employee having a higher rating than he.

The Veterans' Administration sustained the charges of insubordination, and also sustained all the specifications of the charges. These specifications set out the instances of insubordination. Plaintiff says this was not a finding of fact by the Veterans' Administration, but plainly it was. It was not necessary for them to repeat verbatim the specifications. A statement that the specifications were sus-

tained is a sufficient compliance with the requirement that the agency shall make findings.

Plaintiff appealed to the Civil Service Commission. The chief law officer of this Commission affirmed the removal action, and, after an appeal to the Board of Appeals and Review, this Board affirmed the decision of the chief law officer. The holding of the Civil Service Commission was, therefore, tantamount to a finding that the duties assigned were properly assigned and that when plaintiff refused to perform them, he was guilty of insubordination.

This finding of fact by the Civil Service Commission is conclusive, unless arbitrary or capricious, and will not be reviewed by us. It is not for us to say that these duties should not have been assigned to an employee of plaintiff's grade. This is the function of the Civil Service Commission vested in it by the Classification Act of 1949, 63 Stat. 954; 5 U.S.C. 1971, *et seq.* Both the Supreme Court and this court have held a number of times that such findings of fact cannot be reviewed by this court, unless arbitrary or capricious. See *e. g., Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290; *Croghan* v. *United States,* 116 C. Cls. 577; *Love* v. *United States,* 119 C. Cls. 487; *Wittner* v. *United States,* 110 C. Cls. 331.

The Veterans' Administration, however, violated plaintiff's rights, in that they deducted from the annual leave to which he was entitled upon separation the thirty days elapsing between the time he was given notice of the intention to discharge him and the date of his actual discharge. In *Taylor* v. *United States,* No. 50412, decided April 5, 1955, we held this was improper.

Accordingly, plaintiff's motion is granted to this extent only. He is entitled to recover his salary for this thirty days, for which judgment is granted. The amount of the recovery, however, will be determined pursuant to Rule 38 (c).

Defendant's motion is granted except as to the thirty days' pay due plaintiff, as to which it is denied.

It is so ordered.

LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

LARAMORE, *Judge,* dissenting:

I respectfully dissent in the above case for the same reasons set forth in my dissenting opinion in the case of *Taylor* v. *United States,* 131 C. Cls. 387, 392.

MADDEN, *Judge,* concurs in the above dissent.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 50412

(Decided April 5, 1955)

HENRY F. TAYLOR v. THE UNITED STATES

Mr. Carl L. Shipley for the plaintiff.

Mr. Lawrence S. Smith, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant.

OPINION

WHITAKER, *Judge,* delivered the opinion of the court:

Plaintiff sues for loss of salary arising from his dismissal as a civil service employee in the Public Health Service Hospital in Fort Worth, Texas.

On March 25, 1949, plaintiff, a veteran of World War I, was given notice of removal from his position with the United States Public Health Service Hospital at Fort Worth, Texas. The removal was to be effective April 27, 1949, but later this date was changed to June 4, 1949. The notice stated that the reasons for his removal were: (1) insubordination, (2) misconduct, (3) adversely affecting station morale and (4) good of the service. Plaintiff was also

advised that he was being placed on annual leave, effective 8:00 a. m., Monday, March 28, 1949, and would remain on leave for the period March 28 through April 27 because his retention in a duty status would hamper the operations of the station. This involuntary leave on which plaintiff was put was charged against his accrued annual leave, which was sufficient to cover it.

Plaintiff replied to these charges by letter dated March 30, 1949. On April 5, 1949, he was advised that his answer had been carefully considered, that an adverse decision had been rendered and that his removal would be accomplished as stated in the notice.

There followed a series of appeals and hearings. On April 11, 1949, plaintiff appealed to the Fourteenth Civil Service Region, Dallas, Texas. Plaintiff also requested consideration of his case by the agency grievance committee. A hearing was held by this committee and the removal action sustained. Plaintiff's appeal from this decision was denied.

On June 16 and 17, 1949, the Regional Office of the Civil Service Commission, Fourteenth Region, held a hearing on plaintiff's appeal, at which time plaintiff was present. The hearing examiner held that notice of the removal was issued 30 days in advance, that it was specific and in detail, that plaintiff had the opportunity to reply, but that, since plaintiff was not kept in an active duty status during the 30-day notice period, the removal was procedurally defective. He specifically reserved comment on the merits of the case.

This decision was appealed to the Civil Service Commission by the hospital authorities. A hearing was held on September 23, 1949, before the Civil Service Board of Appeals and Review, at which plaintiff was represented. This Board upheld the ruling of the hearing examiner.

The hospital officials appealed this decision to the Civil Service Commission. A hearing was held on March 1, 1950 by the Commission. Plaintiff was represented. In its appeal, the hospital officials explained to the Commission that

the decision to place plaintiff on annual leave during this 30-day notice period was made only after careful consideration by the medical officer, who consulted psychiatrists of the Public Health Service, and that the decision was made because it was believed that to permit plaintiff to remain on duty during this period would involve the serious probability of injury to hospital personnel.

On March 7, 1950, the Commission reversed the prior rulings and held that the agency's action in placing plaintiff on annual leave during this period was reasonable and warranted. This ruling explained that the agency's reasons for not keeping plaintiff on active duty during this period did not have to be included in the removal charges furnished the employee but should have been presented to the Regional Office of the Civil Service Commission.

Plaintiff protested this ruling, and on May 5, 1950, a hearing was held before the Board of Appeals and Review, at which plaintiff was again represented. This Board remanded the case to the Fourteenth Regional Office of the Civil Service Commission for adjudication on the merits. Plaintiff waived further hearing, submitted the case on the record already made, and, on February 13, 1951, the Fourteenth Regional Office upheld the action of the agency in removing plaintiff from his job.

This decision was appealed by plaintiff and on May 9, 1951, another hearing before the Board of Appeals and Review was held, at which plaintiff was represented. On August 17, 1951, the removal action was upheld by this Board.

Section 14 of the Veterans' Preference Act, 58 Stat. 387, 390, as amended, 61 Stat. 723; 5 U.S.C. 863 (1952), sets out the procedure to be followed before a "preference eligible" shall be discharged. This section reads in pertinent part:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, here-

inbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *

All procedural requirements were complied with except that plaintiff was deprived of his pay during the time he was placed on annual leave. This period was charged against his accrued annual leave, to which plaintiff was entitled as of right; thus he has been deprived of his pay for this 30-day period. This was done pursuant to the provisions of the Civil Service regulations (5 CFR 22.2 (c) 1949 ed.). This reads:

Status of employee during period of advance notice. Whether the employee is given thirty (30) days advance notice, under paragraph (a) of this section, or less than thirty (30) days notice under paragraph (a) (2) of this section, he shall be retained in an active duty status during such notice period, except that in cases where the circumstances are such that the retention of the

> employee in an active duty status may result in damage to Government property, or may be detrimental to the interest of the Government, or injurious to the employee, his fellow workers or the general public, the employee may during the notice period be temporarily assigned to duties in which these conditions would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, or placed on leave without pay with his consent. No suspension during such notice period can be effected except as provided in § 9.102 (a) (1) of this chapter. The reasonableness of the applications of such exceptions in any case will be considered in connection with the entire case in the event that the employee subsequently appeals from the final adverse decision reached by the administrative officer.

However, there is nothing in the statute which permits this enforced leave to be charged against an employee's annual leave. The Act says that "no permanent or indefinite preference eligible * * * shall be discharged * * * and the person whose discharge * * * is sought shall have at least 30 days' advance written notice." This means, we think, that he shall have 30 days' notice in advance of his discharge, which means in advance of his being separated from the payroll. The regulation of the Civil Service Commission quoted above would deprive the preference eligible of this right. It would permit his separation from the payroll *eo instante*. This is in conflict with the Act and is, therefore, invalid.

We are of the opinion that plaintiff is entitled to recover his salary for this 30 days.

The decision of the Civil Service Commission upholding plaintiff's discharge is final and conclusive on us, since all procedural requirements were substantially complied with. Section 14 of the Veterans' Preference Act requires the giving of 30 days' advance notice, setting forth the charges,

in order that the employee might have the opportunity to answer the charges in person and in writing, and to furnish affidavits in support of his answer. The right to answer and to support his answer was the right safeguarded. The fact that he was deprived of his pay for this 30-day period did not deprive him of this right. It did nothing to hinder him in the presentation of his answer to the charges and to deprive him of the opportunity of showing that his discharge was unjustified. All other procedural requirements were complied with. It is for this reason that we say that the procedural requirements were substantially complied with, and, therefore, that his discharge must be upheld. *Croghan* v. *United States,* 116 C. Cls. 577; *Wittner* v. *United States,* 110 C. Cls. 231; *Love* v. *United States,* 119 C. Cls. 486; *Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290.

But the deprivation of his pay for this 30-day period is another matter. He was unlawfully deprived of this pay and we think he is entitled to recover it.

Judgment will be suspended until the incoming of a stipulation of the amount due plaintiff, computed in accordance with this opinion, or, in default of the filing thereof in 30 days, until the incoming of a report of a commissioner showing the amount due.

LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

LARAMORE, *Judge,* dissenting:

Section 14 of the Veterans' Preference Act, *supra,* provides that no preferential eligible shall be discharged, suspended for more than 30 days, furloughed without pay, reduced in rank or compensation, or debarred from future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the persons whose discharge, suspension for more than 30 days, furlough without pay, or reduction in rank, or compensation is sought shall have at least 30 days' advance written notice, stating any and all reasons, specifically and in detail, for any such proposed action.

It is to be noted that the statute does not provide for a 30-day *active duty notice.* Section 14, *supra,* merely provides for at least 30 days' advance written notice. There can be no doubt as indicated in the findings that plaintiff was given 30 days' advance written notice.

The question then is what are plaintiff's rights during the 30-day notice period.

Section 22.2 (c) of the Civil Service regulations, *supra,* provides that whether the employee is given 30 days' advance notice or less than 30 days' notice, he shall be retained in an active duty status during such notice period, except in cases where the circumstances are such that retention may be detrimental to the interests of the Government. The employee may during the notice period be placed on annual leave, provided he has sufficient leave to his credit to cover the required period. The reasonableness of the application of such exceptions in any case will be considered in connection with the entire case.

The Civil Service Commission on March 7, 1950, held that the agency's action in placing plaintiff on annual leave during this period was *reasonable and warranted.*

There was concededly a 30-day notice given. The only complaint of irregularity is that plaintiff was placed on annual leave for the 30-day notice period. This, under the Civil Service regulations, *supra,* can be done when the circumstances are such that retention on active duty status "may be detrimental to the interests of the Government." Whether in the circumstances of a particular case retention is or is not detrimental to the interests of the Government, are matters of the same nature as those relating to a discharge. The latter is not for the Court of Claims to decide. When the procedural requirements as set out in the law and regulations have been complied with, this court is not authorized to review the decisions of the U. S. Civil Service Commission on the merits of the action taken. *Croghan* v. *United States,* 116 C. Cls. 577; *Wittner* v. *United States,* 110 C. Cls. 231; *Love* v. *United States,* 119 C. Cls. 486.

The Supreme Court has held that if the procedural requirements are complied with, the Court of Claims has no jurisdiction to review the cause of removal. *Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290.

By the same reasoning this lesser matter of his status during the notice period should not have greater importance than the actual dismissal, and the agency's determination of the matter when sustained by the Civil Service Commission should not be reviewed by the court.

When such requirements have been complied with, the only basis for setting aside the action of the administrative officer is to show that the decision was arbitrary or capricious, or so grossly erroneous as to imply bad faith. There is no such showing in this case. In the absence of such a showing, the decisions have been uniform that this court may not interfere with the action of the administrative agency.

In addition, I do not understand why the logic of the decision of the court does not lead to the conclusion that the separation was completely invalid. If, as the court holds, the procedure required by the statute was not complied with, that would seem to be the necessary result.

I would dismiss the petition.

MADDEN, *Judge,* joins in the foregoing dissent.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner Paul H. McMurray, and the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff, a citizen of the United States, is an honorably discharged veteran of World War I. In 1949 he was employed by the U. S. Public Health Service Hospital, Fort Worth, Texas, and had been employed by the Federal Government in various civil service jobs since 1931.

On March 25, 1949, plaintiff received notice of proposed

action to remove him from his job, effective April 27, 1949. This notice was followed by a series of hearings and appeals, which are hereinafter set forth in detail. The effective date of removal was later extended from April 27, 1949, to June 4, 1949.

2. The notice of March 25, 1949, referred to above, advised plaintiff that action was being taken, pursuant to Section 14 of the Veterans Preference Act, to effect his removal as of the close of business April 27, 1949. The notice further stated that the reasons for his removal were: (1) insubordination, (2) misconduct, (3) adversely affecting station morale and (4) good of the service. This notice also informed plaintiff that he was being placed on annual leave, effective 8:00 a. m., Monday, March 28, 1949, and would remain on annual leave for the period March 28, 1949, through the close of business April 27, 1949, because his retention in a duty status would hamper the operations of the station. Plaintiff had sufficient accrued annual leave to cover this thirty-day period. He was directed by this notice to refrain from visiting any of the operating parts of the station without specific approval of the medical officer in charge. He was also informed of his right to answer the charges.

3. By letter dated March 30, 1949, plaintiff replied in detail to the charges contained in the notice of removal. On April 5, 1949, plaintiff was advised that his answer had been carefully considered, that an adverse decision had been rendered in his case, and that he would remain on annual leave through April 27, 1949, as stated in the original letter of charges. He was also advised by this letter of his right to appeal the agency's decision.

By letter dated April 11, 1949, plaintiff appealed to the Fourteenth United States Civil Service Region, Dallas, Texas.

4. On April 15, 1949, plaintiff requested, in writing, consideration of his case by an agency grievance committee.

In this letter plaintiff cited four specific complaints and designated one member of the Hearing Committee. The medical officer in charge of the hospital nominated another member and those two selected the third. Plaintiff was notified accordingly and this committee held a hearing, at which plaintiff appeared and testified. A copy of the proceedings was furnished him. The committee, in a unanimous opinion, ruled that the plaintiff's grievance had not been substantiated, and that no change in the removal action was indicated.

5. On May 16, 1949, plaintiff was advised in writing of the decision of the Grievance Committee and was again advised of his appeal rights.

On May 19, 1949, he appealed the action of the Grievance Committee. This appeal was denied on June 16, 1949.

6. On June 16 and 17, 1949, the United States Civil Service Commission, Fourteenth Regional Office, Dallas, Texas, held a hearing on plaintiff's appeal, under Section 14 of the Veterans Preference Act, at which time the plaintiff was present.

By letter dated August 2, 1949, the medical officer in charge at the hospital was forwarded a copy of the decision of the hearing examiner who conducted the hearing. This decision, also dated August 2, 1949, stated that the record in the case revealed that the notice of adverse action was issued thirty days in advance, that it was specific and in detail, and that plaintiff was given the opportunity to reply to the charges. It then went on to consider the procedural aspect of the case relating to the retention or nonretention of plaintiff in an active duty status during the thirty-day advance notice period. The examiner cited Part 22.2 (c), chapter Z1, Federal Personnel Manual, as providing that a preference eligible who is to be removed "shall be retained in an active duty status during such notice period, except that in cases where the circumstances are such that the retention of the employee in an active duty status may

result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers or the general public, the employee may during the notice period be temporarily assigned to duties in which these conditions would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, or placed on leave without pay with his consent." The decision concluded that since plaintiff has not been kept on duty during this thirty-day period, his removal was procedurally defective; it specifically reserved comment with respect to the merits of the case.

7. This decision of August 2, 1949, holding that there was a procedural defect, was on August 9, 1949, appealed to the Civil Service Commission by the U. S. Public Health Service Hospital, Ft. Worth, Texas. A hearing before the Civil Service Commission Board of Appeals and Review was held on September 23, 1949, at which time the plaintiff was represented by an official of the American Legion who had served in the same capacity on a prior occasion.

8. On December 2, 1949, the aforesaid Board of Appeals and Review notified the Public Health Service Hospital in writing that the reasons advanced for the nonretention of Mr. Taylor in an active duty status for the full term of the thirty-day advance notice period are such reasons as might be urged in justification of nonretention in advance of any disciplinary removal action, but did not constitute exceptional circumstances contemplated by the regulations as justifying curtailment of the advance notice period. It was, accordingly, found that there had been a violation of the procedural requirements of its regulations in effecting the removal of plaintiff. Plaintiff was notified in writing of the Board's decision.

9. On December 20, 1949, the agency appealed the decision of the Board of Appeals and Review, referred to in finding 8, to the full Civil Service Commission. This appeal reiter-

ated that the only issue involved in the appeal was a limited, procedural issue, namely, the question of what circumstances would justify the agency officials in not keeping the employee, who was being removed, in an active duty status during the thirty-day notice period. The agency advised the Civil Service Commission that the administrative decision, not to retain the plaintiff in an active duty status during this thirty-day notice period, was made only after careful consideration by the medical officer in charge of the hospital, after consultation with officials and psychiatrists of the Public Health Service and that the medical officer in charge and his staff of psychiatrists were convinced that retaining plaintiff on duty during this advance notice period would involve the serious probability of injury to hospital personnel.

10. A hearing was held before the full Civil Service Commission on March 1, 1950, at which time plaintiff was represented.

By letter dated March 7, 1950, the interested parties were notified that the Civil Service Commission had reversed its previous decision and had ruled that the agency's action in placing Mr. Taylor on annual leave during the thirty-day notice period was reasonable and warranted. The prior requests for restoration of plaintiff to duty were withdrawn and the case remanded to the Board of Appeals and Review for final adjudication on the merits. This letter explained to the agency that the reasons for not keeping plaintiff on duty during the thirty-day notice period did not have to be included in the removal charges to the employee but should have been presented to the Commission's Regional Office.

11. By letter of March 19, 1950, plaintiff protested the decision of the Civil Service Commission of March 7, 1950, and a hearing in the case before the Board of Appeals and Review was scheduled for April 19, 1950, but postponed to May 5, 1950. It was held on that date and plaintiff was

represented. The Board of Appeals and Review remanded the case to the Fourteenth Regional Office of the Civil Service Commission, Dallas, Texas, for adjudication on the merits and plaintiff was notified accordingly.

12. By letter dated October 12, 1950, plaintiff advised the Fourteenth Civil Service Regional Office, in essence, that he was submitting his case for adjudication on the merits on the basis of the documents attached thereto and waived any further hearing in the matter. By decision dated February 13, 1951, the Fourteenth Civil Service Region upheld the action of the agency in removing plaintiff from his position and furnished a copy of the decision.

13. By letter dated February 14, 1951, plaintiff appealed the decision of February 13, 1951, to the Civil Service Commission.

A hearing on plaintiff's appeal was scheduled by the Civil Service Commission's Board of Appeals and Review for May 9, 1951, and was held on that date. Plaintiff was again represented at the hearing. The Board, on August 17, 1951, affirmed the decision of the Fourteenth Region and notified the interested parties accordingly. Plaintiff's removal was effected as of June 4, 1949.

14. The evidence in the case fails to establish that plaintiff's removal was arbitrary or capricious or that it was motivated by bad faith.

15. Section 22.2 (c) of the Civil Service Regulations, as it appeared in 1949, when plaintiff was removed, provides as follows:

> (c) *Status of employee during period of advance notice.* Whether the employee is given thirty (30) days advance notice, under paragraph (a) of this section, or less than thirty (30) days notice under paragraph (a) (2) of this section, he shall be retained in an active duty status during such notice period, except that in cases where the circumstances are such that the

retention of the employee in an active duty status may result in damage to Government property, or may be detrimental to the interest of the Government, or injurious to the employee, his fellow workers or the general public, the employee may during the notice period be temporarily assigned to duties in which these conditions would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, or placed on leave without pay with his consent. No suspension during such notice period can be effected except as provided in § 9.102 (a) (1) of this chapter. The reasonableness of the applications of such exceptions in any case will be considered in connection with the entire case in the event that the employee subsequently appeals from the final adverse decision reached by the administrative officer.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

Judgment will be suspended until the incoming of a stipulation of the amount due plaintiff, computed in accordance with this opinion, or, in default of the filing thereof in 30 days, until the incoming of a report of a Commissioner showing the amount due.

APPENDIX C

Veterans' Preference Act of 1944, c. 287; 58 Stat. 387, as amended:

Sec. 14 (5 U.S.C., 1952 ed., Sec. 863)

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for

more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *

Civil Service Regulation 22.2(c) (1949), 5 CFR 22.2(c) (1949 ed.)

Status of employee during period of advance notice. Whether the employee is given thirty (30) days advance notice, under paragraph (a) of this section, or less than thirty (30) days notice under paragraph (a) (2) of this section, he shall be retained in an active duty status during such notice period, except that in cases where the circumstances are such that the retention of the employee in an active duty status may result in damage to Government property, or may be detrimental to the interest of the Government, or injurious to the employee, his fellow workers or the general public, the employee may during the notice period be temporarily assigned to duties in which these conditions would not exist, or placed on annual leave, provided he has suffi-

cient leave to his credit to cover the required period, or placed on leave without pay with his consent. No suspension during such notice period can be effected except as provided in § 9.102 (a) (1) of this chapter. The reasonableness of the applications of such exceptions in any case will be considered in connection with the entire case in the event that the employee subsequently appeals from the final adverse decision reached by the administrative officer.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	1
Statement	2
Argument	3
Conclusion	5

CITATION

Case:	
Taylor v. *United States*, 131 C. Cls. 387	6
Acts and Regulations:	
Annual Leave Act of 1936, 49 Stat. 1161	5
Annual Leave Act of 1951, 65 Stat. 679, 5 U. S. C. 2062 (h)	5
Veterans' Preference Act of 1944, 58 Stat. 387, 390, as amended, 61 Stat. 723:	
Sec. 11 (5 U. S. C. 860)	5
Sec. 14 (5 U. S. C. 863)	2, 4, 5, 6
Civil Service Commission Regulation 22.2 (c) 5 C. F. R. 22.2 (c) (1949 Ed.)	3, 5
Miscellaneous:	
28 Comp. Gen. 526	5

403472—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 380

ANDREW KENNY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, pp. 1a–3a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on March 6, 1956. Rehearing was denied on June 5, 1956. The petition for a writ of certiorari was filed on September 4, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

Whether the Court of Claims correctly held that the circumstances of petitioner's discharge satisfied the procedural requirements of Section 14 of the Veterans' Preference Act.

STATUTES INVOLVED

Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 387, 390, as amended, 61 Stat. 723, 5 U. S. C. 863, provides, in pertinent part, as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: * * *.

Civil Service Commission Regulation 5 C. F. R. 22.2 (c) (1949 ed.) provided:

> *Status of employee during period of advance notice.* Whether the employee is given thirty (30) days advance notice, under paragraph (a) of this section, or less than thirty (30) days notice under paragraph (a) (2) of this section, he shall be retained in an active duty status during such notice period, except that in cases where the circumstances are such that the retention of the employee in an active duty status may result in damage to Government property, or may be detrimental to the interests of the Government, or injurious to the employee, his fellow workers or the general public, the employee may during the notice period be temporarily assigned to duties in which these conditions would not exist, or placed on annual leave, provided he has sufficient leave to his credit to cover the required period, or placed on leave without pay with his consent. No suspension during such notice period can be effected except as provided in § 9.102 (a) (1) of this chapter. The reasonableness of the applications of such exceptions in any case will be considered in connection with the entire case in the event that the employee subsequently appeals from the final adverse decision reached by the administrative officer.

STATEMENT

The undisputed facts of this case are as follows (Pet. 3; R. 20–23): On May 12, 1953, petitioner, a preference eligible holding a legal position in the Veterans' Administration, received a "Notice of Proposed Re-

moval," in accordance with Section 14 of the Veterans' Preference Act, *supra,* charging him with "insubordination" and listing seven specific instances of the alleged insubordination, including refusal to perform work assigned and to deal with his immediate superior. This notice also informed petitioner that he had a right to reply to the charges and receive a hearing; that if the charges were sustained his removal would be effective in not less than 30 days; and that he was being administratively placed on annual leave beginning the following day, May 13, 1955. Petitioner did not deny that he refused to perform the work assigned him but maintained that the assignments should have been given to a higher grade employee (Pet. App. A, p. 1a). The Veterans' Administration found the charge of insubordination to be sustained in all of its specifications and petitioner was discharged for cause effective June 12, 1953. Petitioner appealed his removal to the Civil Service Commission. The Chief Legal Officer of the Commission, by a written decision of August 21, 1953, upheld the removal. Petitioner appealed this decision to the Board of Appeals and Review of the Civil Service Commission which also upheld the removal.

On March 24, 1955, petitioner filed suit in the Court of Claims alleging that his removal was contrary to law in several particulars and that from September 20, 1949, to April 1951, he had performed the duties of a higher grade than the grade for which he was paid (R. 1–6). On the Government's motion for summary judgment and petitioner's cross motion for summary judgment, the Court of Claims sustained the removal but

gave judgment for petitioner in an amount equal to his salary during the 30-day period he was placed on annual leave. Two judges dissented from that part of the decision which granted petitioner this money judgment (Pet. App. A, pp. 1a–3a).

ARGUMENT

Section 14 of the Veterans' Preference Act, *supra*, p. 2, provides, *inter alia*, that employees, such as petitioner, whose discharge is sought, "* * * shall have at least thirty days' advance written notice." Petitioner contended below, as he does here, that, although he clearly had such 30 days advance written notice, the Veterans' Administration's action in placing him on annual leave during the notice period violated the procedural requirements of the Act and that his discharge was, accordingly, invalid. All of the judges below rejected this contention, sustaining the discharge. Three of the judges, however, awarded petitioner a money judgment in the amount of his pay for the 30 days during which he was placed on annual leave prior to discharge. The other two judges dissented from this separate award, accepting the Government's argument that, under existing regulations and statutes, a Government employee may be placed on involuntary annual leave at any time.[1]

[1] Civil Service Regulations 5 C. F. R. 22.2 (c), *supra*, p. 3, issued pursuant to Section 11 of the Veterans' Preference Act, 5 U. S. C. 860, expressly covered the action taken with regard to petitioner in the instant case. More generally, the Annual Leave Act of 1951, 5 U. S. C. 2062 (h), permits government employees to be placed on annual leave, including involuntary annual leave, at any time. See 28 Comp. Gen. 526, interpreting a substantially identical provision in the Annual Leave Act of 1936, 49 Stat. 1161.

Petitioner's basic contention seems to be that the requirement of Section 14 that he receive "* * * thirty days' advance written notice * * *" means 30 days notice during a period of active duty status. It is our position, and that of all the judges of the Court of Claims, that the notice requirement of Section 14 has nothing to do with duty status but deals only with a procedural guaranty of adequate time before separation is effected. As stated by the majority opinion of the Court of Claims in *Taylor* v. *United States*, 131 C. Cls. 387, 391 (Pet. App., p. 8a), "The right to answer and to support his answer was the right safeguarded" by Section 14. Again, as noted there by the minority in the instant case (Pet. App. p. 9a), Section 14 does not provide for a 30-day *active-duty notice* period. So long as the employee is not deprived of the opportunity of answering charges and showing his proposed discharge to be unjustified, the procedural requirements of the statute are met. There is, of course, no doubt, that petitioner received the required notice in this case.

As we see it, petitioner's application to this Court is based on the fact that he has now received, in addition to the requested 30-days notice, something to which he was not entitled, namely, an extra award of pay for that 30 days during which he was placed on annual leave. After study, it was determined that the Government would not seek certiorari on the latter issue at this time. But though the Government's view on that question would defeat petitioner in itself, we do not conceive the point to be an integral part of the decision below that petitioner's discharge—as distin-

guished from the enfored use of annual leave pending the discharge—was prœdurally sound.[2]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition should be denied.

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OCTOBER 1956.

[2] Petitioner seems to imply (Pet. 6–7) that he was deprived of all remuneration from the Government during and for the 30-day notice period. The truth is, of course, that he received his full pay during and for that period; the fact that he was placed on involuntary annual leave during that time meant only that the pay for that 30-day period would be deducted from the pay for the earned but unexpended annual leave for which he was paid on final separation.

U. S. GOVERNMENT PRINTING OFFICE : 1956